

Honorable Thomas S. Zilly

**U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

STRIKE 3 HOLDINGS, LLC, a
Delaware corporation,

Plaintiff,

vs.

JOHN DOE, subscriber assigned IP
address 73.225.38.130,

Defendant.

Case No. 2:17-cv-01731-TSZ

**DEFENDANT'S MOTION FOR A
MORE DEFINITE STATEMENT
ON PLAINTIFF'S FIRST
AMENDED COMPLAINT IN
VIEW OF THIS COURT'S ORDER
AT DOCKET 36**

FRCP 12(e)

NOTING DATE: August 10, 2018

ORAL ARGUMENT REQUESTED

DEFENDANT'S MOTION FOR A MORE DEFINITE
STATEMENT ON PLAINTIFF'S FIRST AMENDED
COMPLAINT IN VIEW OF THIS COURT'S ORDER AT
DOCKET 36 - PAGE 1

CASE No. 2:17-cv-01731-TSZ

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NOTICE OF MOTION

Defendant John Doe (“Doe”), requests the Court mandate Strike 3 Holdings, LLC (“Strike 3”) to provide a more definite statement under FRCP 12(e). in that the FAC does not answer three key questions posed by this Court in sufficient detail

This motion will be heard in the United States District Court, for the Western District of Washington, 700 Stewart St, Seattle, WA 98101, Suite 15229 before the Honorable Thomas J. Zilly, pursuant to the Local Rules, LRC 7(d)(3) for a fourth Friday noting date.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFACE

Strike 3 has sued close to 1000 IP Addresses over the last year. Each of these cases has alleged copyright infringement based in a detection of “pieces” of digital files by an infringement detection software called “International IP Tracker”. (FAC, Dckt 43, ¶25), developed by IPP International U.G., a German company. Strike 3 claims that the system is “not only accurate, but superior to similar software law enforcement uses”. *Id.*

This same infringement detection software has formed the basis of numerous other copyright infringement cases, most notably the Malibu Media cases where over 6,000 IP Addresses have been sued using data generated by International IP Tracker. However, this software not been built, tested, validated, or verified according to an accepted NIST forensic software testing protocols. (See <https://www.nist.gov/itl/ssd/software-quality-group/computer-forensics-tool-testing-program-cftt>).

This motion for a more definite statement is filed because Strike 3’s FAC did not adequately address the Court’s questions in its Order granting Doe’s Motion for a More Definitive Statement. (Dckt 36). Doe respectfully requests that the Court’s concerns and questions be answered, especially as they relate to an overseas computer system that is used to drag consumers into numerous federal courts across this country.

II. INTRODUCTION

Strike 3’s FAC filed on July 3, 2018, Dckt 43, is non-responsive to this Court’s order for a more definitive statement.

1 Firstly, the FAC is notably deficient in that it fails to plead that the pieces downloaded
2 from Doe's IP address are, or contain renderable, viewable versions of Strike 3's copyrighted
3 works or any portion thereof. To the contrary, Strike 3 now admits that it is unable to capture
4 the full, or a playable portion of its motion picture. Dckt 43, ¶ 42.

5 Secondly, the FAC fails to provide sufficient details concerning the software and
6 hardware used by Strike 3's investigator, or to identify several crucial components and
7 operational characteristics essential to evaluating IPP's torrent monitoring system,
8 "International IP Tracker".

9 Lastly, Strike 3 has failed to allege sufficient link between defendant and the IP address
10 at issue.

11 For the reasons stated below, Doe respectfully requests the Court mandate that Strike 3
12 provide a more definitive statement on how its investigation of the alleged infringement was
13 conducted.

14 **III. STATEMENT OF FACTS**

15 On November 16, 2017, Strike 3 filed a Complaint alleging that Doe stole "on a grand
16 scale" a number of adult movies distributed by Strike 3. Dckt. No. 1 at ¶ 4. Strike 3 claims that
17 Doe stole these "Works" using "the BitTorrent protocol," and that Doe not only downloaded
18 the Works, but also distributed them to others. *Id.* Strike 3 further alleges that "Defendant
19 attempted to hide this theft by infringing Strike 3's content anonymously," but that Strike 3
20 connected Doe to IP Address 73.225.38.130. *Id.* at ¶5.

21 Doe filed a motion for a more definitive statement. Dckt 21. This Court granted the
22 motion for a more definitive statement and ordered that a FAC be filed. Dckt 21.

23 **IV. ARGUMENT**

24 **A. THE COURT HAS DISCRETION TO COMPEL STRIKE 3 A SECOND TIME TO MAKE A** 25 **MORE DEFINITE STATEMENT REGARDING ITS TECHNOLOGY UNDER FRCP 12(E)**

26 A motion for more definite statement should be granted if the complaint fails to give the
27 defending party notice of the substance of the claim against them, *Beery v. Hitachi Home*
Electronics (America), Inc., 157 F.R.D. 477, 480 (C.D. Cal. 1993) (internal citations omitted).

Moreover, "the judge may in his discretion, in response to a motion for more definite statement

1 under Federal Rule of Civil Procedure 12(e), require such detail as may be appropriate in the
 2 particular case, and may dismiss the complaint if his order is violated.” *Isomedia, Inc. v.*
 3 *Spectrum Direct, Inc.*, No. C08-1733JLR, 2009 WL 10676390, at *1 (W.D. Wash. Mar. 26,
 2009) (citing *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996)).

4 While a plaintiff may make out the allegations of infringement that satisfy *Twombly*, the
 5 Court is not bound to accept the form the plaintiff’s complaint. For example, in *Jane Doe v*
 6 *Cassel* the Eight Circuit said that a District Court has all tools available under the FRCP to
 7 counteract “at the mercy of overly aggressive plaintiffs.” *Doe v. Cassel*, 403 F.3d 986, 2005
 8 WL 820355 (8th Cir., 2005). Strike 3 is one such overly aggressive plaintiff, whose actual
 damages amount to less than \$ 100, but asks for statutory damages in the millions.

9 Strike 3’s FAC still does not explain the basis for its allegations, let alone provide any
 10 certification or assurance that its investigatory processes eliminate false positives, an area of
 11 concern this Court recently identified. *See Venice PI, LLC. v. Sean O’Leary, et al.* Case 2:17-
 12 cv-00988-TSZ, Dckt. No. 32 (W.D. Wash. Jan. 8, 2018) (rejecting testimony of high-school-
 13 educated Benjamin Perino, who “does not have the qualifications necessary to be considered an
 14 expert in the field in question, and his opinion that the surveillance program is incapable of error
 15 [e.g. false positives] is both contrary to common sense and inconsistent with plaintiff’s
 counsel’s conduct in other matters in this district.”) (“*O’Leary*”).

16 Doe respectfully requests this Court issue an order for a more definitive statement on the
 17 precise process on how Strike 3 arrives at a determination that a case for infringement can be
 18 made.

19
 20 **B. STRIKE 3 FAILED THE ANSWER THE THREE QUESTIONS POSED BY THE COURT IN**
 21 **IT’S ORDER FOR A MORE DEFINITIVE STATEMENT**

22 A party may move for a more definite statement if the pleading is so vague or ambiguous
 23 that the party cannot reasonably prepare a response. Fed. R. Civ. P. 12(e). A motion for a more
 24 definite statement attacks the unintelligibility of a pleading. *Neveau v. City of Fresno*, 392
 F.Supp.2d 1159, 1169 (E.D. Cal. 2005).

25 In its Order, the Court highlight three particular areas where Strike 3’s Complaint was
 26 deficient: (Dckt 36)

- 1 • “plaintiff does not plead that the pieces of the files downloaded from defendant’s IP
- 2 address are or contain renderable, viewable versions of plaintiff’s copyrighted works
- 3 or any portions thereof”.
- 4 • “the operative pleading offers no detail concerning what software or hardware was
- 5 used by plaintiff’s investigator to harvest the pieces of the digital media files at issue”
- 6 • “the Court is unpersuaded that plaintiff has alleged a sufficient link between
- 7 defendant and the IP address at issue”

8 The Court required Strike 3 to file an amended complaint addressing the deficiencies
outlined. As laid out below, Strike 3 has failed to address these deficiencies.

9
10 i) **Strike 3 has not plead that the pieces of the files downloaded from**
11 **defendant’s IP address are or contain renderable, viewable versions of**
12 **plaintiff’s copyrighted works or any portions thereof**

13 Strike 3’s claim for copyright infringement is based on the allegation that Doe copied
14 and distributed its copyrighted works, however as the Court noted in its Order, the complaint
15 pleads that Strike 3’s investigator obtained only one or more pieces of the digital media files
16 listed on Exhibit A from defendant’s Internet Protocol (“IP”) address, and Strike 3 does not plead
17 that the pieces of the files downloaded from Doe’s IP address are or contain renderable, viewable
18 versions of plaintiff’s copyrighted works or any portions thereof.

19 In the FAC, Strike 3 admits that it does **not** have evidence that Doe downloaded complete
20 copies of its works and that the pieces it has linked to Doe’s email address are **not** renderable,
21 viewable versions of plaintiff’s copyrighted works or any portions thereof. These new statements
22 stand in stark contrast to statements made in Strike 3’s original complaint, and in the documents
23 filed to supports its initial *ex parte* request for early discovery.

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DEFENDANT’S MOTION FOR A MORE DEFINITE
STATEMENT ON PLAINTIFF’S FIRST AMENDED
COMPLAINT IN VIEW OF THIS COURT’S ORDER AT
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CASE No. 2:17-CV-01731-TSZ

Original Filings	FAC – Dckt 43
<p>Complaint – Dckt 1</p> <p>¶ 27 – Defendant downloaded, copied, and distributed a complete copy of Plaintiff’s Works</p>	<p>Fieser Decl - Dckt 4-3</p> <p>¶ 9 – IPP’s software additionally analyzed each BitTorrent “piece” distributed by Defendant’s IP Address. It verified that reassembling the pieces using a specialized BitTorrent client results in a fully playable digital movie.</p> <p>¶ 32 - The transactions recorded in PCAPs, contain information about the .torrent file, piece hash, BitTorrent client used by Defendant and time the transaction took place, among other information</p> <p>¶ 34 - The PCAP is a snapshot of the entire download as a whole and does not contain the completed and viewable motion picture.</p> <p>¶ 39 - Discovery will likely show that Defendant illegally downloaded and obtained a full copy of Plaintiff’s motion picture</p> <p>¶ 42 - Plaintiff is unable to capture the full, or a playable portion of its motion picture from Defendant</p>

ii) **Strike 3 offers no detail concerning what software or hardware was used by plaintiff’s investigator**

Bittorrent forensics is extremely complex [RJN 1, RJN 2]. One must record the swarm characteristics to know if the swarm itself is capable of delivering the infringed file (swarm integrity), then test and validate the computer system that records the torrent data (monitoring data integrity), one must test and validate the production of forensic files for third party analysis (evidentiary data integrity and chain of custody). Each step in the process can be the subject of data corruption.

While Strike 3 has attempted to create the appearance of providing more data, the information in the FAC regarding the infringement detection system raises more questions than it answers, for example:

- Strike 3 refers to a “data collection system”. Dckt 43, ¶ 26.
 - What is the architecture of this data collection system?
 - How many processing nodes are used?
 - What IP Addresses do the nodes operate on.
 - What is the bandwidth of each node.
 - What is overall error rate of the Data Collection System (daily, weekly, quarterly, monthly)
- Strike 3 refers to a “proprietary BitTorrent client”. Dckt 43, ¶ 26.
 - When was this software coded?
 - Who coded this Client?
 - Who validated Client?
 - Who designed the Client?
- Strike 3 makes reference to IPP’s BitTorrent client entering the BitTorrent swarm. Dckt 43, ¶27
 - Does IP Tracker monitor the swarm duration?
 - What packets does IP Tracker capture and what packets are thrown away?
 - What PCAP capturing software was used?

These questions should be addressed in order to enable one to assess the validity of the system used to detect alleged infringements. Indeed these questions should be easily answerable, Strike 3’s own investigator has previously provided this information in other matters.

Six years ago, on June 6, 2012, Tobias Fieser provided a “Functional Description” of IPP International IPTracker V.2.1. RJN 3. This document, submitted in that case to support the plaintiff’s request for early discovery, contains more detail about how the IP Tracker system worked than Strike 3’s FAC, and indeed its *ex parte* request for early discovery in this matter.

Six years later, and despite a specific request from the Court, Strike 3 has failed to produce a systems specification, a systems diagram, user manuals, user guides, or anything else that would allow someone to assess the validity of the infringement detection system.

1 The information provided by Fieser in 2012 was analyzed by an independent expert, who
 2 concluded that the that the International IP Tracker code is assembled piece-meal from other
 3 code, it was never designed to or verified by either NIST or IEEE Specifications, it contained
 4 many defects and that there is no evidence that it operates reliably. RJN 4.

5 This Court asked that Strike 3 provide sufficient detail in their first amended complaint
 6 that would allow a defendant to determine the characteristics of the “bittorrent tracking system”
 7 that has been monitoring. But Strike 3’s FAC raises more questions than are answered.

8 The accuracy of Strike 3’s detection system is further called in question by the
 9 unexplained inconsistencies between the FAC and the original complaint. In the original
 10 complaint there were 80 works allegations of infringement, now there are 87. Eight works
 11 were withdrawn from the complaint and fifteen new, completely different, works were added.
 12 Rockenstein Declaration ¶¶5-8. Inconsistencies between the exhibits filed with the original
 13 complaint and that filed with the FAC suggest a false-positive rate of between 10%-17%.
 14 Rockenstein Declaration ¶¶9-11. This suggests an inaccurate data gathering system was used to
 15 generate the ‘Exhibit A’ (remember this ‘system’ is used file over a thousand lawsuits).
 16 Rockenstein Declaration ¶¶12, 13. There is no explanation as to “how” or “why” these
 17 discrepancies occur.

18 The Court asked for details regarding the infringement detection system processes. No
 19 such detailed documentation was provided in the FAC.

20 **iii) Strike 3 does not allege a sufficient link between Doe, the IP address and the**
 21 **infringement**

22 The problem with technology employed by Strike 3 is that almost every consumer of
 23 internet services provided by an ISP is also provided a router (usually WiFi) where up to 250
 24 devices can connect simultaneously, each device being mapper to a single IP address provided
 25 by the ISP. (see <https://www.lifewire.com/how-many-devices-can-share-a-wifi-network-818298>). Thus, while the ISP account holder may have a computer connected to the router, it is
 26 just as likely the next door neighbor has used his account for the downloading of the works at
 27

1 issue. *See AF Holdings LLC v. Rogers*, No. 12cv1519 BTM(BLM), 2013 WL 358292, at *2 (S.D. Cal.
 2 Jan. 29, 2013)¹.

3 Strike 3 and their German “consultants” or “private investigators” do not address this
 4 issue except by stating that a correlation exists between the apparent termination of the infringing
 5 activity activity upon filing of the original complaint (See FAC, ¶¶50, 51). This argument fails
 6 on three grounds. First, this case was filed on 11/16/2017, an inspection of Exhibit A to the FAC,
 7 Dckt 43-1, clearly shows that three works were allegedly infringed after this date (Work 56
 8 (11/22/17); Work 61 (11/30/2017), and Work 70 (12/1/2017)). Second, the IP address may have
 9 been reassigned by the ISP during that time period. Finally, anyone getting notice of a lawsuit
 10 involving their internet services is likely to change their password just like any prudent person
 11 getting a fraudulent transaction notice on their credit card is likely to cancel their credit card.

12 The casual link alleged by Strike 3, while an allegation, must be supported realistic facts
 13 and cannot be conclusory in nature. See *Bldg. 11 Investors LLC v. City of Seattle*, 912 F.Supp.2d
 14 972, 978 (W.D. Wash., 2012) stating ““Factual allegations must be enough to raise a right to
 15 relief above the speculative level.” No such facts are present in the FAC.

16 V. CONCLUSION

17 If this were a case for copyright infringement with a claim of actual damages tied to
 18 failing to pay the \$ 30 subscription monthly fee to the *Blacked*, *Tushy*, and *Vixen* websites, then
 19 the actual damages would amount to less than \$ 2,000.00². But, Doe, a retired police officer, has
 20 been sued for statutory damages where Strike 3 has claimed they are entitled to over \$ 13 Million
 21 in damages³ based on evidence generated by demonstrably inaccurate software.

22 ¹ (“[J]ust because an IP address is registered to an individual does not mean that he or she is
 23 guilty of infringement when that IP address is used to commit infringing activity.”). “While it
 24 is *possible* that the subscriber is also the person who downloaded the movie, it is also possible
 25 that a family member, a resident of the household, or an unknown person engaged in the
 26 infringing conduct.” *Cobbler Nevada, LLC v. Gonzales*, No. 3:15-cv-866-SB, 2016 WL
 27 3392368 (D. Or. June 8, 2016) (dismissing claim where plaintiff did not allege specific facts
 tying defendant to infringing conduct). “Due to the risk of ‘false positives,’ an allegation that an
 IP address is registered to an individual is not sufficient in and of itself to support a claim that
 the individual is guilty of infringement.” *AF Holdings LLC*, 2013 WL 358292, at *3.

² \$30 per month. Subscription for a one year = \$360.00. For 3 websites = \$360*3 = \$1,080.00

³ \$150, 000.00 per work = 150,000.00 * 87 = \$13, 050, 000.00.

Strike 3 has filed approximately 1000 cases relying on this software, assuming an average of 50 infringements claimed per case, the amount of damages that Strike 3 is claiming ranges from 37,500,000.00 to 7,500,000,000.00 (\$7.5B USD) – all against subscribers to alleged IP addresses.

Given that the allegations in the FAC are markedly different and in some cases inconsistent with the original complaint, and we have no more detailed information (accuracy, throughput, validation, etc.) about the IPP software, Doe has no more information in the FAC than he did in the original complaint⁴.

In light of the arguments presented above, Doe respectfully requests that Strike 3 provide a more definitive statement on how its investigation of the alleged infringements was conducted.

Respectfully submitted on July 17, 2018 by: /s/ J. Curtis Edmondson

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⁴ Order at Dckt 36 - ... The question is whether the complaint is “so vague or ambiguous” that defendant “cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). The Court agrees with defendant that the operative pleading does not contain sufficient information to provide him with notice concerning what copyrighted material was allegedly infringed...

CERTIFICATE OF SERVICE

I, J. Curtis Edmondson, hereby certify that on July 17, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 17th day of July, 2018.

By: /s/ J. Curtis Edmondson
J. Curtis Edmondson